(12)

No. 98-591

In The

Supreme Court of The United States
October Term, 1998

Albertsons, Inc., *Petitioner*

v.

Hallie Kirkingburg, *Respondent*

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. (a) Whether an individual with exotropic strabismus, an outward eye turn, resulting in amblyopia, a vision condition marked by reduced visual acuity not correctable by refractive means and not attributable to eye disease, is "disabled" under the Americans with Disabilities Act ("ADA").

(b) Whether an individual with monocular vision is substantially limited in the major life activity of seeing and thus disabled *per se* under the ADA.

2. Whether an employer may choose to adhere to only some of the Department of Transportation's regulations and reject the Department's program to bring those regulations into compliance with the ADA without making an individual assessment of an asserted safety risk.

3. Whether a leave of absence to obtain a vision waiver or reassignment is a reasonable accommodation for an individual who has monocular vision and is employed as a commercial truck driver.

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Relevant Federal Statutes

42 U.S.C. § 12102(2)
42 U.S.C. § 12111(3), (8), and (9)
42 U.S.C. § 12112(a) and (b)
42 U.S.C. § 12113(a) and (b)

Relevant Federal Regulations

29 C.F.R. § 1630.2

Relevant State Statutes

ORS 659.415
ORS 659.420

STATEMENT OF THE CASE

Hallie Kirkingburg, a professional truck driver for over thirteen years who has amblyopia resulting in reduced visual acuity of 20/200 *corrected* in his left eye, filed suit in district court alleging that his former employer, Albertsons, Inc., discriminated against him on account of his vision disability in violation of the Americans with Disabilities Act, 42 U.S.C. § 12112(a) (1994), ("ADA" or "the Act") and failed to reasonably accommodate him. Joint Appendix ("J.A.") 4-6. Albertsons moved "for summary judgment in its favor on the ground that Kirkingburg was not 'otherwise qualified' to

perform the job of truck driver with or without reasonable accommodation." J.A. 39-40. The district court agreed with Albertsons and granted its motion for summary judgment. Kirkingburg appealed. The Ninth Circuit held, in a 2-1 decision, that the granting of summary judgment was erroneous, in part because Albertsons' asserted job requirement that its drivers meet the Department of Transportation ("DOT") vision requirements while not accepting a DOT waiver[1] of those vision requirements screened out otherwise qualified individuals with disabilities and therefore is invalid. J.A. 248. Albertsons petitioned for a writ of certiorari.

Since approximately 1979, Kirkingburg has driven commercial trucks for different employers or independently. J.A. 11. He has a near-perfect driving record. J.A. 289-290, 295-296. He has only been in one accident, and that was determined to not be his fault. J.A. 290. He has no suspensions, no revocations, no reportable accidents in which a citation was issued to him, and no disqualifying moving citations on his driving record. J.A. 295-296, 347-348, 355.

Albertsons hired Kirkingburg in August 1990 as a truck driver at its Distribution Center in Portland, Oregon. J.A. 49. When Albertsons hired Kirkingburg, its transportation manager, Mr. Ted Sturgill, gave him a 18-mile road test in which he found Kirkingburg to be a safe driver. J.A. 349, 358. Afterwards the transportation manager certified, "It is my considered opinion that [t]his driver possesses *sufficient driving skill to operate safely* the type of *commercial motor vehicle* listed above." J.A. 358 (emphasis supplied). The vehicle referenced was a 1988 Kenwood, with a 1989 fifty foot utility trailer. J.A. 358.

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[1] Waivers are issued by the Federal Highway Administration ("FHWA"), an administration of the DOT. 49 U.S.C. § 104(a).

Kirkingburg passed the physical examination he was given at the time of his hire in 1990. J.A. 345-346, 360. He had a valid DOT card and valid medical certificate to drive a truck at the time. J.A. 346-347, 360.

After Kirkingburg started driving for Albertsons, the transportation manager found him to be a "safe driver." J.A. 344. Likewise, the general manager, Mr. Frank Riddle, found Kirkingburg to be a good, safe driver. J.A. 312, 316.

Kirkingburg has always had 20/200 corrected vision in his left eye, it has not changed. J.A. 12, 32, 35. He has 20/20 corrected vision in his right eye. J.A. 35. The reduced acuity in his left eye is due to amblyopia (ICD-9 368.0). *Id.* Amblyopia is a condition marked by low or reduced visual acuity not correctable by refractive means and not attributable to an eye disease. *Id.* In Kirkingburg's case the amblyopia is caused by a longstanding left eye turn (exotropia ICD-9 378.10). *Id.* He has strabismus, an eye turn. J.A. 300. He has had amblyopia since childhood. J.A. 35. Amblyopia is said to exist if the vision is 20/30 or worse with best correction. J.A. 35.

In the opinion of his treating doctor of optometry, Dr. Beatrice Michel, Kirkingburg can easily perform the driving tasks required of him. J.A. 34-36, 304-306. The amblyopia in his left eye does "not interfere with his ability to drive." J.A. 35-36. According to Kirkingburg, his amblyopia has never interfered with his work, with the exception of the problem it created with Albertsons. J.A. 275.

Individuals with full sight in both eyes, binocular as opposed to monocular vision, can rely upon binocular cues for the stereopsis skill. J.A. 300-303. Stereopsis is the ability for both eyes working together to have depth perception limited to short distances rather than long distances. J.A. 300.

> "Stereopsis - the relative localization of visual objects in depth - can occur only in binocular

> vision and is based on a physiologic process derived from the organization of the sensory visual system. It is not acquired through experience and is unequivocal and inescapable."

Gunter K. von Noorden, M.D., *Binocular Vision And Ocular Motility - Theory and Management of Strabismus*, (Mosby 5th ed. 1996),[2] p. 27. "Stereopsis is defined as the relative ordering of objects in depth, that is, in the third dimension." *Id.* at 23.

For distance depth perception, monocular cues are primarily relied upon. J.A. 300-301. These monocular cues to depth perception are particularly pertinent for Kirkingburg as it is related to his diagnosis of strabismus. J.A. 300; *see* von Noorden, *Binocular Vision and Ocular Motility*, supra, at 28-30.[3]

According to Kirkingburg's treating doctor of optometry, Dr. Michel, "there's a lot of misunderstanding about two-eyed vision and what cues are needed to have proper depth perception. . . ." J.A. 301. Dr. Michel testified:

> "People, I think, assume that two eyes are needed for full depth perception when in fact there are significant monocular cues to depth that rely on the vision of one eye only to allow a person to have correct spatial orientation."

J.A. 301. These monocular cues include motion parallax,

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[2] Dr. Michel cited to the second edition of Dr. von Noorden's treatise in her deposition testimony. J.A. 300. Hereinafter the fifth edition will be cited as von Noorden, *Binocular Vision and Ocular Motility*.

[3] Based upon the deposition testimony of Dr. Michel and von Noorden's treatise, the terms "cue" and "clue" appear to be synonymous in this context.

linear perspective, overlay contours, distribution of lights and shadows, the known size of objects, and aerial perspective. J.A. 301.[4] As Dr. Michel explained, "So while the stereopsis test is the test that's required and asked for by DOT, in certain situations like distance viewing, it's not going to be a really particularly relevant or necessary skill." J.A. 301.

In late 1991, after he had been on the job and driving safely for over a year, Kirkingburg suffered a non-driving, work-related injury when he fell from a truck. J.A. 274, 283. He was off work for almost a year, until he was released unconditionally to return to work on November 3, 1992. J.A. 283. Instead of returning him to work, Albertsons sent him to its doctor for an examination. J.A. 283-284.

In November 1992, the examining physician gave Kirkingburg a thorough examination and correctly determined that his vision was 20/20 in his right eye and 20/200 in his left eye, with corrective lenses. J.A. 284, 357. The doctor did not certify him under the DOT regulations[5] and informed Albertsons of his finding on November 6, 1992. J.A. 357, 375. The doctor, or his nurse, told Kirkingburg he needed a "vision waiver." J.A. 284.

Prior to November 6, 1992, the DOT instituted a vision

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[4] *See also,* von Noorden, *Binocular Vision And Ocular Motility, supra,* at 27-28 defining each term.

[5] According to the standard DOT regulations, operators of commercial motor vehicles should have a "distance visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses or visual acuity separately corrected to 20/40 (Snellen) or better with corrective lenses, [and] distance binocular acuity of at least 20/40 (Snellen) with or without corrective lenses." 49 C.F.R. § 391.41(b)(10). Despite Kirkingburg's amblyopia, twice before 1992, when he was hired and again in 1991, he was inaccurately certified as meeting the DOT standard regulations. J.A. 360-361.

waiver program whereby under certain specified limited circumstances it would issue waivers to allow drivers who could not meet the regular vision qualifications of the DOT to operate commercial motor vehicles. 57 Fed. Reg. 31457, 31458 (July 1992); J.A. 389. The vision waiver program was instituted by the FHWA for the purpose of bringing the DOT's vision standards into compliance with the Americans With Disabilities Act without sacrificing highway safety. 57 Fed. Reg. 10295 (March 1992); 57 Fed. Reg. 23370, 23371 (June 1992) ("The FHWA believes, that because it will be consistent with the national policy to facilitate the employment of qualified individuals with disabilities, the waiver program will be in the 'public interest'"); 57 Fed. Reg. 31457, 31459 (July 1992).

Albertsons drivers are to be certified by the Department of Transportation. J.A. 314-315, 344. Albertsons had no physical requirements for vision other than what is contained in DOT regulations. *Id.* Albertsons states it operated by the DOT rules and regulations. J.A. 344. However, there is nothing in writing at Albertsons which specifically adopts the DOT physical requirements as its own. J.A. 340.

Although Albertsons claimed it would not allow its drivers to drive unless they met the minimum DOT vision requirement of 20/40 corrected vision in each eye (J.A. 392), Kirkingburg was allowed to drive for it when first hired in 1990 despite a reported corrected vision of 20/70 in his left eye (J.A. 360), and was permitted to drive in 1991 despite a reported corrected vision of 20/100 in his left eye. J.A. 361. These reports were in Albertsons' possession at the time and raised no "red flags." J.A. 293-294, 341-347, 349-350. No effort was made to disqualify him. J.A. 345-346. He was considered to be a safe driver. J.A. 316, 344, 349.

In order to obtain a vision waiver under the FHWA program, Kirkingburg was required to establish, among other

things, that he had three years of recent experience driving a commercial vehicle without (1) license suspension or revocation, (2) involvement in a reportable accident in which he received a citation for a moving violation, (3) convictions for a disqualifying offense or more than one serious traffic violation, and (4) more than two convictions for any other moving violation in a commercial vehicle. 57 Fed. Reg. 31457, 31460 (1992). In addition, he was required to present proof from an ophthalmologist or an optometrist certifying that his visual deficiency had not worsened since his last examination, that the vision in one eye at least is correctable to 20/40, and that with his "vision deficiency" he is "able to perform the driving tasks required to operate a commercial motor vehicle." *Id.* at 31460.

In other words, as the FHWA stated: "All drivers eligible for a waiver [must] have proven experience and have demonstrated their ability to safely operate a [commercial motor vehicle] for a number of years." *Id.* at 31459.

In December 1992, in accordance with the examining physician's instructions to get a vision waiver, Kirkingburg requested Albertsons help in obtaining the waiver. J.A. 367-369. The DOT required that the employer provide certain of the information necessary to obtain the waiver. J.A. 369-373. Albertsons refused to assist Kirkingburg in obtaining the waiver. J.A. 325-326, 374-375. Kirkingburg had first applied for the waiver on November 12, 1992. J.A. 369. Mr. Sturgill had told Kirkingburg on November 6, 1992 that the vision waiver was to be a "corporate decision." J.A. 367.

On November 20, 1992, Mr. Sturgill called Kirkingburg and informed him that, "We're not going to accept the waiver." J.A. 275-276, 338, 364, 367. The decision was made by Albertsons' corporate legal department - "Boise Legal." J.A. 338-339. Kirkingburg was terminated that day. J.A. 275-276, 365. Mr. Riddle told Mr. Sturgill that

Kirkingburg was terminated because he had failed the visual part of the DOT physical and that the company would not accept a vision waiver. J.A. 338. There was no other reason for his termination. J.A. 339. In the conversation in which Mr. Riddle directed Mr. Sturgill to terminate Kirkingburg, Mr. Riddle stated Kirkingburg "was legally blind, or blind in one eye." J.A. 341.

There is evidence Albertsons did not consider an alternative position for Kirkingburg prior to terminating his employment. J.A. 309, 313-314, 339-340, 343.

Albertsons' personnel manager, Mr. Charlie Norris, was aware of the company's obligation to reasonably accommodate disabilities, but knew of no undue hardship to the company by accepting a vision waiver. J.A. 307-308. Mr. Sturgill believed the undue hardship to be the "liability." J.A. 347. Mr. Sturgill was not involved in any attempts to accommodate Kirkingburg in ways other than accepting the DOT waiver. J.A. 352. Mr. Riddle testified that Albertsons would accept changes in DOT minimum requirements, but not accept the DOT's waiver of standard requirements to accommodate disabled persons. J.A. 315.

In late February 1993, Kirkingburg received a vision waiver from the Federal Highway Administration. J.A. 276, 379-382. The FHWA vision waiver expressly "authorizes the . . . named individual to operate a [commercial motor vehicle] in interstate commerce. . ." under certain specified conditions. J.A. 381-382. Kirkingburg informed Albertsons he had obtained the vision waiver in March 1993. J.A. 385, 386-387. Albertsons never questioned whether Kirkingburg's vision waiver was valid or not. J.A. 351.

Previously, in November and December, 1992, Kirkingburg had requested to be reinstated. J.A. 367-368. Albertsons denied his request. J.A. 374-375.

After Kirkingburg obtained his vision waiver and while he had a valid DOT card, Albertsons spoke to him about a yard hostler position. J.A. 271, 320-321, 343. This was the first job Albertsons spoke about with Kirkingburg. J.A. 277. Although Albertsons required DOT certification for that position, the job was designed such that not all yard hostlers had to be certified. J.A. 321, 324. Indeed, Albertsons would allow workers with license restrictions, such as due to alcohol, to be yard hostlers. J.A. 324-325. Although Kirkingburg did what he was told to get the yard hostler position, and thought he had obtained it, Albertsons never gave him the job. J.A. 32, 271, 277-280. Later, Albertsons informed the Oregon Bureau of Labor and Industries that it withdrew the offer because "we became concerned because the position does require DOT certification." J.A. 395-396. However, Mr. Riddle was unaware the offer had been withdrawn, having been told by an Albertsons' attorney that Kirkingburg had turned down the position. J.A. 321-322, 327. Kirkingburg never turned down the position. J.A. 32.

Some time later, Albertsons discussed a second job, tireman, with Kirkingburg, but he rejected that position because he had never changed a truck tire in his life, was told it paid $5 or $6 less per hour than he had been making, it would not get him back to driving trucks, and he understood he was not qualified for the job. J.A. 280-282.

Other jobs, including truck driving positions, became available but were not discussed with Kirkingburg. J.A. 268, 269, 280-281.

In June 1993, Scott Jardine, Corporate Director of Transportation, issued a memorandum stating the company's policy as follows:

> "In situations where reasonable accommodations to a driver with a disability are legally required, our priority is to accommodate

the driver in ways other than a DOT minimum qualification waiver."

J.A. 389-390. Previously in 1993, Mr. Jardine had identified Kirkingburg as the "driver with the vision problem in Portland." J.A. 376.

SUMMARY OF ARGUMENT

This Court should affirm the Ninth Circuit's opinion in this case in its entirety. The Ninth Circuit correctly reversed the district court's granting of summary judgment on Kirkingburg's claim under the ADA. The court correctly held that Kirkingburg was disabled under the Act, and that there were genuine questions of fact as to whether he was a qualified individual under the Act in that he could perform the essential functions of the commercial truck driver position. The court also correctly ruled that Albertsons could not chose to follow only one part of the federal regulatory scheme (the DOT's standard minimum vision requirements) while rejecting another part of the regulatory scheme (the FHWA vision waiver program), in part because Albertsons had failed to produce any evidence that Kirkingburg or any other vision waiver recipient posed a direct safety threat.

1. Kirkingburg Is Disabled.

Kirkingburg has a physical impairment that substantially limits the major life activity of seeing. He has exotropic strabismus, an outward eye turn, resulting in amblyopia, a vision condition marked by reduced visual acuity not correctable by refractive means and not attributable to eye disease. He has reduced visual acuity of 20/200 corrected in his left eye, a loss of some peripheral vision, and altered short-

distance depth perception. Kirkingburg has monocular vision, that is he essentially sees out of one eye. Due to his monocular vision, Kirkingburg is incapable of using binocular mechanisms, stereopsis, for perceiving near-distance depth perception. Stereopsis is the skill of two eyes being able to sense three dimensional near-distance depth perception. Kirkingburg's absolute inability to perform stereopsis, his significant loss of acuity in one eye, and the overall narrowing of his peripheral vision constitute a substantial limitation in the major life activity of seeing.

Although his mind has made adjustments and accommodations so that he is able to cope with his vision impairment, Kirkingburg is significantly restricted as to the condition and manner in which he "sees" as compared to the average person in the general population. These adaptations and adjustments enable Kirkingburg to cope with his vision impairment and thus function in everyday life. However, the fact that he has mitigated the effects of his impairment does not mean that he is therefore not protected by the provisions of the Act. 29 C.F.R. Pt. 1630, App. § 1630.2(j).

The substantial limitation requirement does not require Kirkingburg to establish both that his sight is significantly restricted as compared to the average person and also that his limitation in sight substantially limits his ability to perform some indeterminate number of his or some average individual's routine daily activities. Albertsons' proposed standard that "substantially limited" requires that daily life activities involved with the major life activity be significantly restricted is too restrictive a standard for the definition of disability, is inconsistent with the statutory language, and is contrary to this Court's holding in *Bragdon v. Abbott*, where the Court ruled that a major life activity need not be a public, economic, or daily activity. 524 U.S. 624, ---, 118 S.Ct. 2196,

2205 (1998). Albertsons' proposed standard attempts to create a dysfunctional component to the definition of "disabled," when functionality should be addressed in the "otherwise qualified" analysis.

2. Albertsons Perceived Kirkingburg To Be Disabled.

Kirkingburg also produced evidence that Albertsons perceived him to be disabled. Because this issue was not properly raised in Albertsons' original questions presented in its Petition for Writ of Certiorari, this Court need not, and indeed should not, address this issue. *Blessing v. Freestone*, 520 U.S. 329, 340 n. 3, 117 S.Ct. 1353, 1359 n. 3 (1997). Since it provides an alternative basis for the Ninth Circuit's opinion, this case should be remanded for trial regardless of the Court's ruling on the issues properly presented.

Recognizing the Court's inherent ability to address the perceived disability claim should it choose to, Kirkingburg argues that Albertsons took adverse action against him based upon its view that his vision was inadequate and thus disabling. Kirkingburg's supervisor's referred to him as "legally blind or blind in one eye," J.A. 341, when Albertsons terminated him. Since Albertsons terminated Kirkingburg from its employment without considering any alternative positions prior to his termination, there is evidence Albertsons terminated him from the type of employment involved due to its perception of his vision impairment. Thus, there is evidence Albertsons perceived Kirkingburg's vision impairment to substantially limit the major life activity of seeing and working.

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3. Kirkingburg Can Perform The Essential Functions Of The Truck Driving Position.

Despite Kirkingburg's lifelong amblyopia, given the nature of that condition and his ability to develop adaptations and adjustments for coping with his visual impairment, Kirkingburg is able to drive a commercial truck safely. Since Kirkingburg has had monocular vision throughout his life, he has developed the use of monocular cues that enable him to effectively sense distance depth perception. Although persons with monocular vision cannot perform stereopsis, it is the development of adaptations and adjustments, including the use of monocular cues, that enables Kirkingburg to drive safely.

Kirkingburg produced evidence that he had driven a commercial truck safely for approximately eleven years before being hired by Albertsons, was given an 18 mile road test by Albertsons when he was hired after which Albertsons certified that he "possesses sufficient driving skill to operate safely" a commercial truck and trailer, and Albertsons found him to be a safe driver for the approximately 16 months that he drove for it. Given this past history of safe driving and Albertsons' own assessment of Kirkingburg as a safe driver, the Ninth Circuit correctly held that a reasonable fact finder could conclude that Kirkingburg was able to perform the essential functions of the commercial truck driving position.

4. Albertsons Could Not Reject The Vision Waiver For The Reasons It Did. It Had No Evidence Kirkingburg Posed A Direct Safety Threat.

As did the Ninth Circuit, this Court should reject Albertsons' argument that its business judgment justifies

insisting on its drivers meeting one set of DOT standards to the exclusion of the FHWA's vision waiver program, which was instituted in order to comply with the ADA. The DOT certification was a prerequisite to the job, not an essential function of the job. Albertsons, or any other employer, is not free to insist on following only one part of the DOT regulations, while ignoring the vision waiver program that the FHWA used to bring its regulations into compliance with the ADA, when in doing so it screens out a class of individuals on the basis of a disability without individual assessment.

Any job prerequisite that blanketly screens out individuals with disabilities must be justified by the employer as job-related and consistent with business necessity. 42 U.S.C. § 12113(a). Here, Albertsons' insistence on only following the standard minimum vision requirements and its rejection of the vision waiver program in the absence of individual assessment is not job related, nor is it justified by business necessity, because without the individual assessment it cannot legitimately be said to be closely related to, nor necessary to perform, the essential function of driving a commercial truck. More importantly, Albertsons cannot justify its rejection of the vision waiver program on generalized fears about safety. That is precisely the type of discrimination the ADA was meant to protect against.

Ultimately, Albertsons' argument is that, as an employer, it has a right to exercise its business judgment to adopt the regular DOT vision standards as its own and refuse to accept the FHWA vision waiver program. However, under the ADA and other federal discrimination laws the employer's business judgment is not absolute. In order to justify its termination of Kirkingburg due to his amblyopia based upon its asserted fears about safety, Albertsons was required to do an individual assessment of Kirkingburg and determine if he

was a direct safety threat based upon objective evidence. However, the Ninth Circuit correctly found that "Albertsons has simply failed to produce any evidence that Kirkingburg and any other waiver recipients pose a direct safety threat." J.A. 246. The individual assessment that was made as to whether Kirkingburg posed a direct safety threat was made by the FHWA when it determined he was a safe driver through its vision waiver program. Indeed, prior to learning of Kirkingburg's disability, Albertsons itself found Kirkingburg to be a safe driver and certified that assessment. In the absence of an individualized assessment, Albertsons did not have the right to assert that all individuals with Kirkingburg's vision impairment are unsafe to drive based upon the DOT minimum requirements that the FHWA had determined could be safely waived.

5. Albertsons Failed To Accommodate Kirkingburg Prior To Terminating His Employment And Any Post Termination Attempt At Accommodation Does Not Relieve It From Liability For The Termination.

There is no evidence Albertsons considered reassignment to a vacant position before it terminated Kirkingburg. Reassignment is one form of reasonable accommodation specifically provided for under the statute. 42 U.S.C. § 12111(9)(B). The yard hostler position could have been used for a reassignment. Any attempt by Albertsons to offer Kirkingburg a job as a tireman months after it terminated Kirkingburg was not a reasonable accommodation, given the nature of the job, and it was made too late to insulate Albertsons from liability for the prior termination.

ARGUMENT

I. Kirkingburg Is Disabled Under The ADA: His Physical Impairment of Amblyopia Substantially Limits The Major Life Activity Of Seeing.

Under Title I of the ADA, no covered employer "shall discriminate against a qualified individual with a disability because of the disability of such individual" in regard to the terms, conditions, or privileges of employment. 42 U.S.C. § 12112(a). In this case, there is no dispute as to whether Albertsons terminated Kirkingburg's employment due to his vision condition, amblyopia due to exotropia strabismus. It did. J.A. 338-339. The primary issue is whether Kirkingburg is protected under the ADA.

The ADA defines disability as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such impairment.

42 U.S.C. § 12102(2). Kirkingburg brought claims under both subsection (A), physical disability, and subsection (C), perceived disability. J.A. 4-6.

Determining whether an individual has an actual disability under subsection (A) involves three steps: (1) the plaintiff must establish he or she has a physical or mental impairment; (2) the plaintiff must identify a major life activity which is impacted by the impairment; and (3) the impairment must substantially limit the major life activity identified. *Bragdon v. Abbott*, 524 U.S. at ---, 118 S.Ct. at 2202.

The statute does not provide definitions for

"impairment," "major life activity," or "substantially limited." However, the Equal Employment Opportunity Commission ("EEOC"), the agency delegated authority to carry out the ADA, 42 U.S.C. § 12116, has defined these terms in its implementing regulations. 29 C.F.R. § 1630 *et seq.* As reasonable agency interpretations of the statute, the EEOC regulations are entitled to deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-844, 104 S.Ct. 2278, 2782-2783 (1984). In addition to the implementing regulations, the EEOC has published an Interpretive Guidance on the ADA as an appendix to the regulations. *See* 29 C.F.R. Pt. 1630, App. As this Court has stated, "the well-reasoned views of the agencies implementing a statute 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.'" *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2206.

A. Kirkingburg's Strabismus And Resulting Amblyopia Is A Physical Impairment Under The Act.

Under the regulations, physical impairment is defined as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting . . . special sense organs." 29 C.F.R. § 1630.2(h)(1). Kirkingburg has strabismus, an eye turn, resulting in amblyopia, a condition marked by low or reduced visual acuity not correctable by refractive means and not attributable to an eye disease. J.A. 35, 300. Kirkingburg has reduced visual acuity of 20/200 corrected vision in his left eye. Thus, Kirkingburg's physiological condition affecting a sensory organ is an impairment under the Act.

B. Seeing Is A Major Life Activity And The Only Major Life Activity That Need Be Considered.

Adopting the definition of the term from the Rehabilitation Act regulations, 34 C.F.R. §104, the EEOC has interpreted major life activities as "those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. Pt. 1630, App. § 1630.2(i). The regulations contain an inexhaustive list of major life activities including "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Kirkingburg's amblyopia limits the major life activity of seeing. J.A. 35, 299-306.

Albertsons' proposed standard of "normal daily activities requiring eyesight" undermines the statutory framework as it relates to major life activities and is contrary to the essential purpose of the Act statute, which as the First Circuit has stated is "to protect individuals who have an underlying medical condition or other limiting impairment, but who are in fact fully capable of doing the job." *Arnold v. United Parcel Service, Inc.*, 136 F.3d 854, 861 (CA1 1998); *see also* Brief of Amicus Curiae Justice For All, et al., at section I., discussing the purpose of the Act. When making the initial disability determination, it is essential to focus on, and not to stray from, the major life activity in question. Albertsons proposes a framework whereby to determine if an individual is substantially limited in a major life activity, one examines whether the individual's normal daily activities involving a major life activity are impacted, rather than whether the major life activity itself is impacted. Under Albertsons' framework, it becomes necessary to identify both *a major* life activity and

additional "normal daily activities." Albertsons fails to cite to the statute or its implementing regulations to support its argument. *See* Pet. Br. at 21-23. The statute only requires the impairment substantially limits *one* major life activity, no more. 42 U.S.C. § 12102(2)(A).

In holding reproduction was a major life activity, this Court stated that to be major, a life activity need not have a public, economic, or daily dimension. *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2205. Instead, "'the touchstone for determining an activity's inclusion under the statutory rubric is its significance.'" *Id., quoting, Bragdon*, 107 F.3d 934, 940 (CA1 1997). Focusing on normal daily activities, as Albertsons proposes, removes the element of significance which is fundamental to the definition of major life activity. The "major life activities" requirement refers to "basic activities," not necessarily routine or discretionary daily activities, the performance of which may be dependent upon personal choice. How one chooses to engage in a major life activity on a daily basis is simply not an aspect of the definition of disabled under the ADA. *See Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2206. The proper inquiry in this case is whether and to what extent Kirkingburg's impairment restricts the major life activity of seeing itself. The Court need not also inquire how his limitation in seeing restricts additional normal daily activities, or how his impairment restricts other major life activities such as working.[6]

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[6]Albertsons' focus on the major life activity of working is neither necessary nor proper. The Ninth Circuit did not address that issue. The EEOC Interpretive Guidance provides that the major life activity of working is only to be considered in cases where the individual is not substantially limited with respect to any other major life activity. 29 C.F.R. Pt. 1630, App. § 1630.2(j). The Interpretive Guidance provides the following example: "if an individual is blind, *i.e.*, substantially limited

C. Kirkingburg's Condition of Amblyopia Substantially Limits The Major Life Activity Of Seeing.[7]

An impairment is a disability only when it substantially limits a major life activity. 42 U.S.C. § 12102(2)(A). However, a substantial limitation does not mean an utter inability. *Bragdon, supra*, 524 U.S. at ---,118 S.Ct. at 2206. Instead, an impairment is substantially limiting if it either prevents a major life activity or "significantly restricts" it. 29 C.F.R. § 1630.2(j)(1). If an individual is "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity," the individual is substantially limited with respect to that major life activity. 29 C.F.R. § 1630.2(j)(1)(ii). Thus, the analysis of whether an impairment is substantially limiting involves a consideration of differences. The Act does not cover all differences, but differences that amount to significant restrictions are covered. *Id.*

In this case, the condition and manner in which Kirkingburg sees are significantly restricted as compared to the

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in the major life activity of seeing, there is no need to determine whether the individual is also substantially limited in the major life activity of working." *Id.* Here, this Court need only address whether Kirkingburg's "seeing" is substantially limited.

[7]Because Albertsons did not raise the issue of whether Kirkingburg's amblyopia substantially limits a major life activity in the district court, the record on that issue is not as developed as it might otherwise be.

average person. Kirkingburg does not simply have low visual acuity; he has uncorrectable visual acuity in one eye of 20/200, meaning that in one eye he sees at 20 feet what those with unimpaired acuity see at 200 feet.[8] Albertsons does not dispute that Kirkingburg's condition causes loss of peripheral vision. Pet. Br. at 6;[9] *see also*, Frank B. Brady, *A Singular View–The Art of Seeing With One Eye*, (4th ed. 1988), pp. 26-27. As to near-distance depth perception, Kirkingburg is not only restricted, he is unable to perform the binocular stereopsis skill. *See* J.A. 300-301; von Noorden, *Binocular Vision and Ocular Motility, supra,* at 27. Thus, three primary aspects of vision – acuity, peripheral vision, and stereopsis, – are significantly restricted as compared to the average person.[10]

Most people see using two eyes. Kirkingburg sees using one eye. Kirkingburg sees not only in a fundamentally different manner than the average person but also in a

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[8] Daniel G. Vaughan, et al., *General Ophthalmology*, (Appleton & Lange, 14th ed. 1995), p. 32.

[9] Albertsons' reference to loss of depth perception is more accurrately labeled a loss of stereopsis. *See* von Noorden, *Binocular Vision and Ocular Motiltiy, supra,* at 27; American Academy of Opthalmology, *Pediatric Opthalmology and Strabismus,* Basis and Clinical Science Course, 1998-1999 (1998) pp. 35-36 ("*Stereopsis* and *depth perception* should not be considered synonymous terms. Monocular clues contribute to depth perception.")

[10] Primary visual functions tested in a basic ophthalmologic examination, include acuity, peripheral vision, and binocular function or alignment, which includes the stereopsis ability. Daniel G. Vaughan, et al., *General Opththalmolgy*, (Appleton & Lange, 14th ed. 1995) pp. 31-34, referencing a chapter on "strabismus." *See also*, A.J. McKnight, et. al., *The Visual and Driving Performance of Monocular and Binocular Heavy-Duty Truck Drivers*, 23 Accid. Anal. & Prev., pp. 226-227 (1991) (examining the impact of certain aspects of vision on driving).

significantly restricted manner in that he has to function using one sensory organ to perform the major life activity of seeing while most people rely on two sensory organs to perform that activity. *See generally* B. Brady, *A Singular View, supra.* Functioning with two eyes allows an individual to appreciate short-distance depth based on stereopsis. Individuals with monocular vision do not have this ability to appreciate depth based on stereopsis. J.A. 300-301; von Noorden, *Binocular Vision and Ocular Motility, supra,* at 23-27. As a result of seeing using only one eye, the condition under which Kirkingburg sees is significantly restricted in that he is completely unable to use certain mechanisms, specifically retinal disparity and convergence, to sense short-distance depth perception as compared to those who use two eyes to see. *Id.*; *see also,* B. Brady, *A Singular View, supra*, at 27-32.

Humans have at their disposal two sets of cues for orientation in space. von Noorden, *Binocular Vision and Ocular Vision, supra*, at 29. Physiological cues provided by fusion of disparate retinal images afford the direct perception of spatial relation, *i.e.* binocular stereopsis. *Id.* at 29. The monocular cues to spatial localization are achieved on the basis of experience. *Id.* Thus, as an individual with monocular vision, Kirkingburg lacks the physiologically based cues necessary for direct perception of spatial relationship and must rely upon monocular cues developed through experience.

Although as an individual with monocular vision Kirkingburg is able to use some mechanisms for short-distance depth perception, *e.g.* accommodation, he has had to learn to develop and rely upon monocular cues such as relative motion and perspective to cope with his impairment. J.A. 300-306; *see* von Noorden, *Binocular Vision and Ocular Vision, supra,* at 27-29; B.Brady, *A Singular View, supra,* at 31-43.

> "A person stereoblind since infancy must rely exclusively on monocular clues and will flawlessly perform most ordinary tasks requiring depth discrimination, such as pouring milk into a glass or parallel parking. He or she will fail abysmally, however, when a higher degree of stereopsis becomes essential and monocular clues are no longer available, for instance, as occurs in the limited field vision provided by an operating microscope."

von Noorden, *Binocular Vision and Ocular Motility, supra,* at 29. Kirkingburg not only sees *differently* than most others, his sight, in particular stereopsis ability, is significantly restricted because he essentially has only one eye with which to see.

How Kirkingburg performs his daily activities with his monocular vision is not an appropriate consideration in determining the initial question of whether he is disabled. Superimposing an additional requirement of establishing a substantial limitation of normal daily activities is not only inconsistent with the EEOC regulations, the requirement is inconsistent with the Act itself. According to the statutory language an individual is disabled if he or she has "a physical impairment that substantially limits *one or more* of the major life activities." 42 U.S.C. § 12102(2)(A) (emphasis added). Thus, it is sufficient in this case that one major life activity, "seeing," is significantly restricted "as to the condition, manner or duration under which it can be performed." 29 C.F.R. § 1630.2(j)(1)(ii).[11] Having established that primary

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[11] Albertsons has offered no reason why the principles set forth in *Chevron, supra,* 467 U.S. at 843-844, 104 S.Ct. at 2782-2783, as employed in *Bragdon v. Abbott*, should not be followed regarding deference to this EEOC regulation regarding the substantially limited factor. Albertsons does not argue that the EEOC's regulations regarding

aspects of the major life activity of seeing are substantially limited, Kirkingburg need not also establish how that limitation in seeing prevents him from performing normal daily activities. Put another way, having established that he (a) is incapable of seeing in stereopsis, (b) has had to develop and rely upon monocular cues for depth perception, and (c) has a reduced field of vision, Kirkingburg need not also establish that his inability and restrictions limit his ability to do a variety of daily life activities. For example, Kirkingburg need not also establish he is limited in daily activities such as shaking hands, pouring liquid into a container, using stairways, or threading a needle. *See* B. Brady, *A Singular View*, *supra*, at 45-60 (discussing the "pitfalls" for individuals who recently or suddenly have monocular vision and how to develop skills and techniques to function despite the loss).

Having established that Kirkingburg's amblyopia substantially limits the major life activity of seeing, this Court need not address Albertsons' argument that monocular vision is *not* a *per se* disability under the ADA. *Bragdon*, *supra*, 524 U.S. at ---, 118 S.Ct. at 2207. However, should this Court choose to address the *per se* issue, it should find monocular vision is a disability *per se*. Given the science of vision, a monocular vision individual is inherently unable to use certain binocular vision mechanisms to sense near-distance depth

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significant restrictions in condition or manner are arbitrary, capricious, or manifestly contrary to the statute, which, under *Chevron, supra,* would justifiy not deferring to the EEOC regulations. *Chevron, supra,* 467 U.S. at 843-844, 104 S.Ct. at 2782-2783. In *Bragdon,* this Court stated it draws guidance from the views of the agencies authorized to administer the ADA. 524 U.S. at ---, 118 S.Ct. at 2209. Albertsons offers no reason to stray from that principle in the application of the substantially limited factor and nor should this Court find one.

be disabled. Certain conditions are inherently substantially limiting. 29 C.F.R. Pt. 1630, App. § 1630.2(j).[12] Thus, monocular vision is a disability *per se* under the ADA.

Albertsons' application of its proposed standard demonstrates the standard's flaws. Pet. Br. 22-25. In essence, it muddles the analysis of major life activity and qualified individual with a disability. That Kirkingburg has had a long employment history and that he is able to drive do not determine the question of whether he is substantially limited in the major life activity of *seeing*. The definition of disability under the ADA is not job-specific. Job-specific considerations only come into play in determining whether one is otherwise qualified or substantially limited in the major life activity of working. In this case, Kirkingburg's ability to drive is relevant only to the issue of whether he is qualified for the position in question, not to whether he is disabled under the Act. If *driving* were the major life activity under consideration, then any limitations, or lack thereof, on his ability to drive would be relevant to the disability determination.[13] However, here the

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[12] The text and purpose of the ADA demonstrate that certain impairments are always disabilities. *See* Brief of Amicus Curiae Justice For All, et al. at section II. Impairments are not simply deemed to be disabilities *per se* under the Act. Rather, when the statutory framework is applied some impairments always substantially limit one or more major life activities and thus will always constitute a disability under the Act. *Id.*

[13] Unfortunately, once a court strays from the disciplined analysis required under the Act, a flawed analysis such as that proposed by Albertsons is not uncommon. In *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50, 52 (CA5 1997) the court noted the plaintiff's monocular vision limits his peripheral vision, which should have been the focus of the issue. However, the court then went on to hold his major life activity of seeing was not limited because he could drive and was a marksman. Likewise, in *Haldums v. Coca-Cola Bottling Co.*, 3 AD Cases 1202 (Tenn. Ct. App.

major life activity under consideration is seeing, which is sufficient to meet the threshold for protection under the Act. 42 U.S.C. § 12102(2).

Albertsons' proposed standard would force individuals to establish not only that a major life activity is significantly restricted but also that the individual is unable to perform the "normal daily activities" involving that major life activity. The proposed standard attempts to add a dysfunctional component to the definition of "disabled," rather than addressing functionality in the "otherwise qualified" analysis. This approach adds an additional significant barrier not supported by the statute, regulations, or legislative history. Albertsons' proposed standard would force individuals to establish they cannot function in daily life to a substantial degree in order to gain initial protection under the ADA, but then subsequently require them to establish they can function well enough to perform the essential functions of a particular job. Congress did not intend to create such a Catch-22. Instead, the very essence of the Act is to protect those who are able to function despite limitations caused by physical or mental impairments.

F.3d 50, 52 (CA5 1997) the court noted the plaintiff's monocular vision limits his peripheral vision, which should have been the focus of the issue. However, the court then went on to hold his major life activity of seeing was not limited because he could drive and was a marksman. Likewise, in *Haldums v. Coca-Cola Bottling Co.*, 3 AD Cases 1202 (Tenn. Ct. App. 1993) (applying Tennessee law based upon the Rehabilitation Act), the court noted the monocular visioned route manager was not substantially limited in a major life activity despite his inability to perform all occupational functions that require close-up depth perception such as a surgeon or jeweler. The court disregarded the limitation to seeing and held the individual was not disabled because there were numerous other jobs he could perform. *Id.* at 1204. Again, the court erred when it went beyond the major life activity of seeing to examine additional major life activities.

Arnold, supra, 136 F.3d at 861, *citing* numerous subsections of 42 U.S.C. § 12101; *see* 42 U.S.C. § 12101(8) (purpose of statute is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency" for individuals with disabilities); *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2206 (one may be substantially limited "even if the difficulties are not insurmountable").

Significantly, Albertsons does not offer any reason why this Court should reject the EEOC's regulatory guidance followed by the Ninth Circuit. Clearly Kirkingburg sees in a "manner" that is significantly restricted compared to an average person. He can only use one eye to see instead of two and *cannot* perform vision functions, such as stereopsis, that require two eyes. That Kirkingburg is able to see well enough to drive is due to his development of the use of monocular cues. J.A. 299-306. Such self-accommodation does not negate the limiting nature of his impairment. *Bartlett v. New York Bd. of Law Examiners*, 156 F.3d 321, 329 (CA2 1998) (an individual's ability to self-accommodate for her reading disorder does not foreclose a finding of disability); 29 C.F.R. pt. 1630, App. § 1630.2(j) (mitigating factors are not to be considered when accessing the disabled status of a individual); *Arnold, supra,* 136 F.3d at 859-863. It is Kirkingburg's lifelong development of mechanisms to cope with his vision limitation (J.A. 305-306) that in part establishes Kirkingburg's sight is significantly restricted in manner and condition compared to the average person. According to the EEOC regulations that should be sufficient to be protected under the Act. 29 C.F.R. § 1630.2(j)(1)(ii).

The Eighth Circuit's analysis in *Doane v. City of Omaha*, 115 F.3d 624, 627-28 (CA8), *cert. denied,* 524 U.S. ---, 118 S.Ct. 693 (1998) of whether a monocular vision individual is substantially limited in seeing despite the

individual's ability to adjust and make mental adaptations presents a sound analysis of the issue. After examining the actual medical effect of monocular vision on a person's major life activity of seeing, including lack of three dimensional near-distance depth perception and loss of peripheral vision, the Court held that the individual was disabled despite that "his brain has learned to work with environmental clues to develop his own sense of depth perception using only one eye and that he has learned to compensate for his loss of peripheral vision by adjusting his head position." 115 F.3d at 627.

The Ninth Circuit correctly followed the Eighth Circuit's reasoning. As opposed to the Fifth Circuit's ruling in *Still v. Freeport-McMoran, Inc.*, 120 F.3d 50 (CA5 1997), *Doane* is the more thorough and better reasoned opinion and is more consistent with the Act and Congress' intent. *See* H.R. Rep. No. 101-485, 101st Cong., 2d Sess., pt. 2, p. 52 (1990) (House Education and Labor Committee), *reprinted in* 1990 U.S.C.C.A.N. 303, 334 (hereinafter "House Report, pt. 2") (an individual is substantially limited when major life activities are restricted as to condition, manner, or duration and that assessment is to be made without regard to mitigating factors); *see Coleman v. Southern Pacific Transp. Co.*, 997 F.Supp. 1197, 1202-1203 (D. Ariz. 1998) (comparing the analysis in *Doane*, *supra*, to that used by the Fifth Circuit in *Still*, *supra*, and finding *Doane* to be better reasoned and more persuasive).

II. Albertsons Regarded Kirkingburg As Substantially Limited In The Major Life Activities Of Seeing And Working.

An additional and independent basis for affirming the Ninth Circuit decision is that a genuine issue of fact exists as to whether Albertsons regarded Kirkingburg as disabled.

Albertsons did not include within the three questions presented in its Petition for Certiorari the issue of perceived disability, although that was an "alternative ground" for the Ninth Circuit's decision in this case. J.A. 236-237. In its brief on the merits, Albertsons nevertheless raises the perceived disability issue, even though the original question presented simply addressed whether amblyopia is a disability *per se*. Since certiorari was granted on the *per se* issue, this Court need not, and indeed should not, consider the perceived disability issue. *Blessing, supra,* 520 U.S. at 340 n.3, 117 S.Ct. at 1359 n. 3; *Capital Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 760, 115 S.Ct. 2440, 2445-2446 (1995); Sup. Ct. Rule 14.1(a). Nevertheless, should this Court decide to consider the perceived disability issue, Respondent will address the merits of that issue.

Under the third prong of the definition of disability, the ADA provides that even an individual without a disability who is regarded by an employer as having an impairment that substantially limits a major life activity is an individual with a disability. 42 U.S.C. § 12102(2)(C); 29 C.F.R. Pt. 1630, App. § 1630.2(1).

Here, even if Kirkingburg were not substantially limited in a major life activity, the evidence raises a genuine question of material fact as to whether Albertsons considered his vision impairment to substantially limit the major life activity of seeing. Mr. Riddle referred to Kirkingburg as "legally blind or blind in one eye." J.A. 339, 341. However, the documentation available to Albertsons at the time established he was not blind and did not label him "legally blind." J.A. 357. Indeed, on appeal Albertsons conceded Kirkingburg's combined acuity was never legally blind. J.A. 185. According to precedent established under the Rehabilitation Act, perceiving someone to be legally blind or

blind would constitute regarding them as substantially limited in the major life activity of seeing. *See Norcross v. Sneed*, 573 F.Supp. 533, 536 (W.D. Ark. 1983), *aff'd*, 755 F.2d 113 (CA8 1985) (legally blind individual is handicapped); *Gurmankin v. Costanzo*, 411 F.Supp. 982, 989 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (CA3 1977) (blind person is handicapped).[14] Since the ADA is to provide as broad protection as the Rehabilitation Act, 42 U.S.C. § 12201(a), Mr. Riddle's comment raises a genuine issue of material fact as to whether Albertsons perceived Kirkingburg as disabled in the major life activity of seeing.

Albertsons' decision to terminate Kirkingburg as a result of his vision impairment and thus treat him as unable to perform any of its jobs, including all those involving driving, is evidence Albertsons treated Kirkingburg as substantially limited in the major life activity of working. In reference to the first definition of disability, the EEOC has stated: "An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes. . . ." 29 C.F.R. Pt. 1630, App. § 1630.2(j). However, in explanation of the "regarded as" definition of disability the EEOC explains an individual "rejected from a job" may be covered by the Act, where he or she is rejected because of the prejudices and misconceptions associated with disabilities. 29 C.F.R. Pt. 1630, App. § 1630.2(1). Thus, under the "regarded as" prong, where an individual does not assert any limitations, an

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[14] Although these Rehabilitation Act cases involved individuals with binocular impairment, it is unclear from Mr. Riddle's comment whether he perceived Kirkingburg to be legally blind, as in *Norcross*, or only legally blind in one eye. In either case, as demonstrated above, perceiving Kirkingburg to be blind in one eye would be sufficient, since monocular vision substantially limits seeing.

employer regards the individual as substantially limited in the major life activity of working when the employer terminates the individual's employment due to a perceived impairment, as defined under the Act. 29 C.F.R. § 1630.2(1).

As described in lower courts the proper standard to employ in the context of perceived disability cases involving the major life activity of working is the employer's foreclosure of "the type of employment involved, not the range of job tasks." *See, e.g., Forrisi v. Bowen*, 794 F.2d 931, 935 (CA4 1986); *Gordon v. E.L. Hamm & Associates, Inc.*, 100 F.3d 907, 913 (CA11 1996), *cert. denied*, 524 U.S. ---, 118 S.Ct. 630 (1997). Albertsons foreclosed the type of employment involved when it terminated Kirkingburg as a driver and refused to consider other employment alternatives prior to his termination. *Best v. Shell Oil Co.*, 107 F.3d 544, 548 (CA7 1997) (a trier of fact could find that the employer perceived truck driver with a knee injury "as having a disability that prevented him from working as a truck driver for the company").

Albertsons argues that its offer of the tireman position, long after it terminated Kirkingburg, establishes as a matter of law that it did not regard Kirkingburg as substantially limited in a class or broad range of jobs. Pet. Br. at 26-27. Albertsons misapplies the single position analysis to the issue of working. This is not a case where the employer excluded the individual only from certain of its positions due to limitations asserted by the individual. Thus, *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 541 (CA9 1997) and *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121 (CA5 1998) are readily distinguishable since in each the plaintiff asserted physical limitations. Here, in the absence of any medical restrictions being asserted by Kirkingburg, Albertsons unilaterally disqualified Kirkingburg from all driving jobs, including the

yard hostler job. Thus, in Albertsons' corporate mind, Kirkingburg was unable to perform the entire class of jobs involving driving, not just one driving position.

Albertsons' eventual offer of the tireman position is too late and too distinctively different a type of job to be determinative. Albertsons did not consider any alternative job between November 6, 1992, when for the first time it treated Kirkingburg's vision impairment as substantially limiting his ability to see and work, and November 20, 1992 when it terminated him. Albertsons' lack of consideration of alternative employment is evidence Albertsons regarded Kirkingburg as unable to work at all at the time it terminated him. Albertsons' tardy action after the termination cannot as a matter of law insulate it from liability for previously terminating Kirkingburg's employment.

Albertsons' argument that its perception of Kirkingburg must be based upon "myths, fears, or stereotypes associated with disabilities" is too narrow a reading of the "regarded as" definition of disability. Pet. Br. at 25-26. The EEOC's Regulations and Interpretive Guidance clarify that even an innocent misconception of an individual's impairment can be sufficient to satisfy the statutory definition of a perceived disability. *Deane v. Pocono Medical Center,* 142 F.3d 138, 144 (CA3 1998). Moreover, the EEOC has explained that common attitudinal barriers, including concerns over "safety, insurance, [and] liability," frequently result in employers excluding individuals with otherwise non-disabling impairments. 29 C.F.R. pt. 1630, App. § 1630.2(l). Here, Albertsons asserts its decision was based on its concern about safety, but there is evidence the concern was about liability. J.A. 174-175, 347. The success of the DOT vision waiver program and scientific studies available at the time, and subsequently, demonstrate those fears about safety were

unfounded.[15] Discrimination based upon such exaggerated and unfounded fears is "precisely the type of injury Congress sought to prevent[,]" with the regarded as prong. *School Bd. of Nassau Cty. v. Arline*, 480 U.S. 273, 285, 107 S.Ct. 1123, 1130 (1987).

III. Kirkingburg Is A Qualified Individual With A Disability.

Under the ADA, in order to establish that an individual is protected, the individual must show that he or she suffers from a disability and is a "qualified individual." 42 U.S.C. § 12112(a). A "qualified individual" is an individual who (1) "satisfies the requisite skill, experience, education and other job related requirements" of the employment position in question, and (2) "who, with or without reasonable accommodation, can perform the essential functions" of the position. 29 C.F.R. § 1630.2(m). The EEOC regulations define "essential functions" to mean "the fundamental job duties of the employment position. . . ." 29 C.F.R. § 1630.2(n)(1).

The EEOC's Interpretive Guidance suggests a two step analysis for determining whether an individual is qualified: (1)

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[15] The statistics gathered from the waiver program indicate the drivers with waivers performed "more safely than those drivers in the general population of commercial drivers." 59 Fed. Reg. 59386, 59389 (1994); *see also, e.g.*, A.J. McKnight, et al., *The Visual And Driving Performance of Monocular and Binocular Heavy-Duty Truck Drivers*, 23 Accid. Anal. & Prev., pp. 225-237 (1991) ("It was concluded that monocular drivers have some significant reductions in selected visual capabilities and in certain driving functions dependent on these abilities, compared with binocular drivers. However, monocular drivers are not significantly worse than binocular drivers in the safety of most day-to-day driving functions.")

whether the individual satisfies the prerequisites for the position; and (2) whether or not the individual can perform the essential functions of the position, with or without reasonable accommodation. 29 C.F.R. Pt. 1630, App. § 1630.2(m). In this case, the heart of the issue is whether Albertsons can, as a matter of law, insist that the DOT standard minimum vision requirements for DOT certification be met and refuse to accept a DOT waiver of those vision requirements as part of the prerequisites of the job of commercial truck driver on the mere assertion of a safety concern. The Ninth Circuit correctly held, that on this record, Albertsons cannot require such a prerequisite.

A. Kirkingburg Can Perform The Essential Functions Of A Commercial Truck Driver.

Albertsons admits that "[d]riving trucks in interstate commerce is the sole function of this position." Pet. Br. at 36. Thus, by definition driving is the essential function of the position. Kirkingburg produced unrefuted evidence that he successfully performed that sole essential function for Albertsons from August 21, 1990 through December 3, 1991 (J.A. 312, 316, 344), and had satisfactorily performed similar truck driving jobs for 11 or more years before his employment, without being involved in an accident that was his fault. J.A. 11, 289-290, 295-296. Albertsons itself tested Kirkingburg's driving ability and certified that he "posseses sufficient driving skill to operate safely" a commercial truck. J.A. 358. Based upon Kirkingburg's demonstrated history of his ability to successfully drive a commercial truck, with his amblyopia, a reasonable juror could conclude he could perform the sole essential function of the truck driving position. *Doane v. City of Omaha, supra,* 115 F.3d at 628 (plaintiff's prior successful

job performance in position in question creates question of fact for jury).

B. Kirkingburg Produced Evidence That He Possessed The Prerequisites Of The Truck Driving Position, Including DOT Certification Through The Vision Waiver Program.

Whether a person satisfies the prerequisites for a position is determined by assessing whether the individual possesses "the appropriate educational background, employment experience, skills, licenses, etc." 29 C.F.R. Pt. 1630, App. § 1630.2(m). As the EEOC elaborated in its Technical Assistance Manual, necessary prerequisites may include: "education, work experience, training, skills, licenses, certificates, and other job related requirements, such as good judgment or ability to work with others." EEOC: Technical Assistance On Title I of ADA § 2.3, *reprinted in* 8 Fair Employment Practices (BNA) 405:6981, at 405:6993 (hereinafter "EEOC Technical Assistance Manual").

Here, Kirkingburg produced evidence that he possessed the necessary employment experience, he had years of driving experience, with only one accident which was determined not to be his fault. J.A. 11, 289-290, 295-296. To the extent an educational background was required, he had obtained an associate degree. J.A. 272. Albertsons itself certified he possessed the necessary "skills," to drive "safely" after an 18-mile driving test. J.A. 358. He had no license suspension or disqualifying moving violations on his record. J.A. 295-296, 347-348, 355. According to his doctor of optometry, the amblyopia in his left eye does not interfere with his ability to drive. J.A. 35-36. Kirkingburg possessed the appropriate

"licenses" and/or "certificates" for he either held a valid DOT card or later obtained a FHWA vision waiver and such a card. J.A. 278-279, 345-346, 361. Kirkingburg was allowed to drive while certified despite not meeting the DOT minimum requirements. Therefore, Kirkingburg produced evidence from which a reasonable juror could find he satisfied the legitimate prerequisites of the job.

C. Albertsons Cannot Arbitrarily Choose Which DOT Standards It Will Apply Or Reject Based Upon A Generalized Safety Fear In The Absence Of An Individualized Assessment Of The Alleged Safety Risk, When The Rejected Standards Were Adopted To Comply With The ADA.

Albertsons argues it can require the DOT regular minimum vision standards be met as a legitimate job prerequisite and failure to meet those standards prevents an individual from performing the essential job function of driving a truck for Albertsons, because Albertsons will not allow such a driver to drive, even though the DOT will. Albertsons' argument relies too heavily upon the ADA's allowance for business judgment and a strained application of a district court case, *Campbell v. Federal Express Corp.*, 918 F.Supp. 912 (D. Md. 1996).

Although the ADA allows for business judgment, an entity's business judgment is not absolute and does not apply to all prerequisites. When as here the business judgment is to rely upon one set of DOT standards and refuse to accept a

DOT program designed to comply with the ADA,[16] it is not enough for Albertsons to assert it is exercising its business judgment regarding safety, when there is no evidence in the record of any individual assessment, or objective medical evidence, to support the presence of such a safety risk. *See* section IV., *infra*.

As the EEOC explains: "The Act does not interfere with an employer's authority to establish appropriate job qualifications. . .[,]" however, qualification standards or selection criteria that screen out or tend to screen out an individual with a disability on the basis of the disability "must be job related and consistent with business necessity." EEOC Technical Assistance Manual at § 4.1, *reprinted in* 8 FEP at 405:7018. To be job-related and consistent with business necessity the selection criteria must be "a legitimate measure or qualification for the specific job it is being used for," not a class of jobs, and it must relate to an essential function of the job. *Id.* at § 4.3. "A standard may be job related but not justified by business necessity, because it does not concern an essential function of a job." *Id.* at § 4.3(2).

Here, the legitimate job-related qualification for the specific job in question was DOT certification, which Kirkingburg obtained through the FHWA vision waiver program. Any additional minimum vision requirement which screens out on the basis of disability an entire class of individuals without individual assessment is not a legitimate

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[16] The FHWA's establishment of the vision waiver program was consistent with Congress' desire and "expect[ation] that the DOT would make the necessary changes to its regulations in order to end unwarranted discrimination against the disabled." *Rauenhorst v. U.S. Department of Transportation*, 95 F.3d 715, 717 (CA8 1996), *quoting* the relevant legislative history, *citing to* House Report, pt. 2, at 57, *reprinted in* 1990 U.S.C.C.A.N. at 339.

prerequisite and therefore does not legitimately concern the essential function of truck driving, since the FHWA vision waiver program establishes that where a waiver is granted the requirements of that function as to vision are met. J.A. 381-382. Just as this Court noted in *Arline*, while deference should be given to the judgments of public health officials as to whether a person is qualified in the context of a contagious disease, *Arline*, 480 U.S. at 288, 107 S.Ct. at 1131, so also should deference be given to the public agency that authorized Kirkingburg to drive a commercial truck in interstate commerce.

As the EEOC warns regarding "blanket" exclusions by "standards that exclude an entire class of individuals with disabilities," although the employer may believe such standards are necessary for safety reasons, "in most cases they will not meet ADA requirements" because an employer's legitimate concerns of safety must be addressed through an "objective assessment of a particular individual's current ability" to perform the job in question safely. EEOC Technical Assistance Manual, § 4.4, *reprinted in* 8 FEP at 405:7023. Thus, any business judgment regarding safety cannot be applied in a blanket fashion as Albertsons did here, because the DOT determined Kirkingburg to be a safe driver through the vision waiver program, 57 Fed. Reg. 31458, 31459 (1992), and to the extent Albertsons performed any individual risk assessment, it had previously found Kirkingburg to be a safe driver. J.A. 358.

Albertsons is correct to the extent it argues the ADA does not require it to lower its qualitative standards as those standards relate to production standards. Pet. Br. at 32-33. However, this case does not involve production standards. *Compare, Milton v. Scrivner*, 53 F.3d 1118 (CA10 1995) (employer not required to lower universally applied production

schedule for disabled grocery selector position).

Likewise, Albertsons' reliance on *Campbell, supra,* is misplaced because that case held the plaintiff was required to exhaust DOT administrative remedies before suing under the ADA. Notably, in *Campbell* the plaintiff did not apply for a waiver of the DOT regulations. Thus, *Campbell* is inapposite, since here Kirkingburg sought and obtained a waiver, but Albertsons refused to accept it.

The essence of Albertsons' position is that as an employer it has the right to exercise its business judgment and to adopt the regular DOT vision standards as its own and to refuse to accept the FHWA vision waivers because of its concern for safety. Pet. Br. at 33-35. A fundamental flaw in Albertsons' position is that an employer's business judgment is not absolute. The ADA requires that a disabled person not be discriminated against due to his vision disability when the individual has obtained the requisite DOT certification and demonstrated he can perform the essential function of safely driving a commercial truck. The goal of the waiver program was to "obtain sufficient empirical data, which, when analyzed, will provide a reliable basis for establishing visual requirements that are consistent with the goals of safety, yet provide maximum employment opportunity for those persons covered under the [ADA] and the Rehabilitation Act of 1973." 57 Fed. Reg. 10295 (March 1992). When as here, Albertsons asserts a blanket qualification standard that disqualifies individuals due to a disability based upon safety fears, it must conduct an individual assessment. 29 C.F.R. § 1630.2(r). To allow Albertsons to reject the DOT's compliance with the ADA by simply asserting a general safety concern is precisely the kind of discrimination the Act was meant to protect against. House Report, pt. 2, at 58, *reprinted in* 1990 U.S.C.C.A.N. at 340. ("It would also be a violation to deny

employment to an applicant based on generalized fears about the safety of the applicant. . . .").

Ultimately, Albertsons' business judgment must comply with federal law. By refusing to accept the FHWA waivers as satisfying the position's legitimate prerequisites Albertsons took the position it could choose to follow one set of DOT regulations and reject the DOT's program to bring those regulations into compliance with the ADA. *See Rauenhorst, supra,* 95 F.3d at 716-717. Albertsons' business judgment should not trump the federal agency's efforts to revise its regulations to conform to the requirements of the ADA, as Congress directed it to do. House Report, pt. 2, at 57, *reprinted in* 1990 U.S.C.C.A.N. at 339 (DOT expected to make necessary changes to bring regulations into compliance). Had Albertsons wanted to challenge the validity of the FHWA waivers it could have challenged them directly. *See Carpenter v. Department of Transp.*, 13 F.3d 313, 314-315 (CA9 1994); *see also, Advocates for Highway and Auto Safety v. FHWA,* 28 F.2d 1288 (CA DC 1994). In the absence of a judicial challenge, Albertsons could have devised and conducted an individual assessment of the supposed safety risk posed by Kirkingburg and similarly situated drivers by which it claims to have been guided. In the absence of either action, Albertsons should not be able to use its generalized fear of a safety risk or liability to pick and choose with which DOT regulations and programs it will choose to comply. The Ninth Circuit correctly held Albertsons could not choose to adhere to only part of the DOT regulations, while refusing to disregard the FHWA waiver due to generalized safety concerns.[17]

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[17] Albertsons' attempt to color the issue by consistently referring to the vision waiver program as "experimental" does not alter the above analysis. The DOT does not refer to the program as experimental. After

IV. There Is No Objective Evidence In The Record That Kirkingburg Posed A Direct Safety Threat As A Truck Driver Due To His Vision Impairment.

The ADA allows employers to assert, as a defense, that an individual poses a direct threat to the health or safety of other individuals in the workplace. 42 U.S.C. § 12113(a), (b). Direct threat is defined as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). As an affirmative defense, the employer bears the burden of proving the employee poses a direct threat. *Rizzo v. Children's World Learning Ctrs., Inc.*, 84 F.3d 758, 764 (CA5 1994). Whether an individual poses a direct threat when doing a particular act is a fact-intensive question. *Id.*

A slightly increased risk is not sufficient to establish that a condition poses a direct threat. 29 C.F.R. Pt. 1630, App. § 1630.2(r). Significant risks, as required by the Act, are those which pose a high probability of substantial harm. *Id.* "[A] speculative or remote risk is insufficient." *Id*; *see also,* House Report, pt. 2, at 56, *reprinted in* 1990 U.S.C.C.A.N. at 338.

Although determining whether a significant risk of

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the vision waiver program was vacated by the D.C. Circuit in *Advocates For Highway and Auto Safety, supra,* 28 F.3d at 1289, on remand the agency determined it could safely continue the program for those already in it. 59 Fed. Reg. 59386, 59387 (1994). That program continues to grant waivers to the present. *See* 63 Fed. Reg. 54519 (Oct. 1998) (waivers granted to 12 individuals). Indeed, the Eighth Circuit has ordered monocular vision individuals be allowed to apply for vision waivers and be individually assessed, even though the stated application period previously ended. *Rauenhorst, supra,* 95 F.3d at 723; 63 Fed. Reg. 1524, 1527 (1998) (Rauenhorst granted a vision waiver). Albertsons' "experimental" argument was not raised at the time it refused to accept the waiver; it should not be persuasive now.

harm exists is made from the employer's standpoint, the employer's assessment cannot be based on its own subjective belief of risk, even if it is in good faith. *Bragdon, supra*, 524 U.S. at ---, 118 S.Ct. at 2210. Nor can an employer rely on "irrational fears, patronizing attitudes, or stereotypes . . . ." 29 C.F.R. Pt. 1630, App. § 1630.2(r). Instead, the assessment of whether an individual with a disability poses a significant risk of harm must be based on objective scientific information. *Bragdon, supra,* 524 U.S. at ---, 118 S.Ct. at 2210.

In this case, at the time of its decision to terminate Kirkingburg, Albertsons had no objective evidence that Kirkingburg posed a significant risk to the health or safety of himself, others, or even property. Indeed, in its brief, Albertsons does not identify any objective evidence in the record that indicates Kirkingburg posed a direct safety threat when driving. Albertsons notes that it had evidence from a doctor that Kirkingburg was "below minimum DOT safety regulations." Pet. Br. at 40. However, that was the same doctor, or his nurse, who told Kirkingburg to get a vision waiver. J.A. 284. Albertsons had no medical evidence that Kirkingburg's vision created a significant risk of harm; it had let him drive before with vision that did not meet the minimum standards.

The Interpretive Guidance suggests evidence that may be relevant to the direct threat determination, including "input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors [or others] who have expertise in the disability involved and/or direct knowledge of the individual with the disability." 29 C.F.R. Pt. 1630, App. § 1630.2(r). The evidence must relate to the specific individual's present ability to perform the job and not generalized assumptions about the nature or effect of a

disability. EEOC Technical Assistance Manual § 4.5(4), *reprinted in* 8 FEP at 405:7023; House Report, pt. 2, at 56, *reprinted in* 1990 U.S.C.C.A.N. at 338. Indeed, the requirement for individualized assessments under the ADA was one of the reasons for the FHWA vision waiver program. 57 Fed. Reg. 10295 (March 1992); 57 Fed. Reg. 23370, 23371 (June 1992); 57 Fed. Reg. 31457, 31459 (July 1992).

Albertsons did have direct knowledge of Kirkingburg and his ability to drive safely. In reviewing his 18-mile road test, Albertsons' transportation manager certified Kirkingburg "possess[ed] sufficient driving skill to safely" operate a commercial motor vehicle. J.A. 358. Kirkingburg's experience in similar positions demonstrates he was not a direct threat. He had held professional driving positions before Albertsons and had an impeccable driving record. J.A. 11, 289-290, 295-296. In its files, Albertsons had Kirkingburg's previous certification exam reports which for 1990 reported a corrected vision of 20/70 in his left eye and for 1991 reported a corrected vision of 20/100 in his left eye. J.A. 360-361. Albertsons allowed Kirkingburg to drive with his vision condition; the reports raised no "red flags" at the time. J.A. 293, 341-343, 344-345, 346-347, 349-350. The doctor's report which went to Albertsons stated that Kirkingburg's 20/200 vision in his left eye was "since birth," indicating Kirkingburg's vision was not worsening but had remained constant. J.A. 357. To the extent opinions of eye doctors with direct knowledge of Kirkingburg's disability were available, his treating eye doctor's opinion was that his "amblyopia in the left eye will not interfere with his ability to drive." J.A. 35-36. The FHWA had determined monocular vision drivers with safe driving records such as Kirkingburg were safe to drive. 57 Fed. Reg. 23370, 23371 (1992). Thus, the objective evidence available to Albertsons at the time it terminated Kirkingburg

did not establish he posed a direct safety threat. To the contrary, the evidence indicated Kirkingburg could continue to safely drive with his lifelong vision condition.

Albertsons' direct safety threat argument also fails because in terminating Kirkingburg due to his visual impairment, it made no individualized assessment of the risk as required by the ADA. 29 C.F.R. § 1630.2(r); *E.E.O.C. v. Union Pacific R.R.*, 6 F.Supp.2d 1135, 1138 (D.Idaho 1998) (failing to conduct individualized assessment of whether monocular visioned driver posed direct safety threat precluded employer's direct threat defense). Even when faced with a perceived safety risk, "an individualized assessment of the individual's present ability to safely perform the essential functions of the job" is necessary to establish an employee poses a direct safety threat. 29 C.F.R. § 1630.2(r). Individualized assessments prevent an employer from making judgments based on unfair and inaccurate stereotypes. *Bombrys v. City of Toledo*, 849 F.Supp. 1210, 1219 (N.D. Ohio 1993). Albertsons' decision to terminate Kirkingburg was based solely on his vision and his need for a vision waiver, not on an individual assessment of his present ability to perform the essential functions of the job safely. Except for being informed that Kirkingburg needed to obtain recertification through the vision waiver program, there was no other information from which Albertsons could conclude Kirkingburg was no longer able to safely perform the job he had been performing for Albertsons. Albertsons did not perform an individual assessment. The FHWA made the individual assessment of Kirkingburg's ability and found him to be a safe driver that it authorized to drive through the vision waiver program. J.A. 379-384; 57 Fed. Reg. 31457, 31459 (1992).

The Ninth Circuit correctly held that based upon the purpose and requirements of the vision waiver program, the FHWA determined Kirkingburg was a safe driver. That determination precludes Albertsons from declaring that the standard minimum vision requirements must be met to eliminate a direct safety threat. J.A. 246-248. Although Albertsons could have conducted an individual assessment to determine whether Kirkingburg posed a direct safety threat, it did not.

V. Albertsons Failed To Reasonably Accommodate Kirkingburg's Disability.

The ADA imposes an affirmative obligation on the employer to reasonably accommodate individuals with disabilities. 42 U.S.C. § 12112(b)(5)(A). Thus, Albertsons had an obligation to provide reasonable accommodation to Kirkingburg prior to terminating him on November 20, 1992. Any accommodations offered after the termination cannot relieve Albertsons' liability for the unlawful termination.[18]

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[18] For the first time in this case, Albertsons argues that an individual regarded as disabled is not entitled to any reasonable accommodation. Pet. Br. at 48. Nothing in the statutory language requires such an interpretation. Because it has not been raised before it should not be addressed at this time.

One category of reasonable accommodation consists of "accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities." 29 C.F.R. pt. 1630, App. § 1630.2(o). Thus, in a perceived disability claim the employer's obligation is to remove whatever barriers exist as a result of its misconceptions. Furthermore, should this Court agree with the Ninth Circuit and find Kirkingburg is disabled under the first prong of the ADA's definition of "disabled," then there is no need to decide the question of whether he is entitled to a reasonable accommodation under the "regarded as" prong.

In general, reasonable accommodations are modifications or adjustments that enable an employee to perform the essential functions of the job. 29 C.F.R. § 1630.2(o). Reasonable accommodations are designed to "reduce or eliminate unnecessary barriers between the individual's abilities and the requirements for performing the essential job functions." EEOC Technical Assistance Manual § 4.5(4), *reprinted in* 8 FEP at 405:6999. In this regard, the ADA differs from other federal discrimination statutes, such as Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e, in that it, in appropriate circumstances, will require a "change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." 29 C.F.R. Pt. 1630, App. § 1630.2(o). Possible reasonable accommodations under the Act include, but are not limited to, job restructuring, modified work schedules, *reassignment*, and *adjustment or modifications of policies*. 42 U.S.C. § 12111(9)(B) (emphasis added). An employer must make reasonable accommodations for an otherwise qualified individual unless it can demonstrate the accommodation would impose an undue hardship on the employer's business. 42 U.S.C. § 12112(b)(5)(A). Undue hardship is defined as "an action requiring significant difficultly or expense . . . ." 42 U.S.C. § 12111(10)(A).

The determination of whether an accommodation is appropriate is fact-specific and should be made on a case-by-case basis. House Report, pt. 2, at 62, *reprinted in* 1990 U.S.C.C.A.N. at 344. A leave of absence may be a reasonable accommodation under the ADA, where following the leave the

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Bragdon, supra, 524 U.S. at ---, 118 S.Ct. at 2201.

employee is able to perform his duties. *Schmidt v. Safeway, Inc.*, 864 F.Supp. 991, 996 (D.Or. 1994) (leave of absence to obtain treatment for alcoholism where treatment was likely to be successful was reasonable accommodation as a matter of law). In this case, having DOT certification was a prerequisite of the job. In November 1992, Kirkingburg could obtain DOT certification through receipt of a FHWA vision waiver. Albertsons failed to reasonably accommodate Kirkingburg by refusing to provide him with a short leave of absence or other form of job restructuring in order to obtain the vision waiver.

At the time Kirkingburg was informed he needed to obtain a waiver, he had a good driving record and possessed all the qualifications necessary to obtain a FHWA waiver. Kirkingburg began the waiver application process prior to being notified of his termination. J.A. 367. The DOT required the employer to provide certain of the information necessary to obtain the waiver, but Albertsons refused to assist Kirkingburg in obtaining the waiver. J.A. 145, 325-326, 367-370.

Even if Albertsons did not have an obligation to allow Kirkingburg a leave of absence to obtain a vision waiver, it could have accommodated him prior to terminating him through reassignment to a vacant position. 42 U.S.C. § 12111(9). Albertsons' assertion that reassignment when an individual cannot be reasonably accommodated in his or her current position goes beyond the mandate of an employer's obligations ignores the plain language of the statute: "'reasonable accommodation' may include . . . reassignment to a vacant position." 42 U.S.C. § 12111(9). The Interpretive Guidance notes that the employer's obligation of reassignment applies only to current employees, and does not extend to applicants. 29 C.F.R. Pt. 1630, App. § 1630.2(o). Generally, reassignment only needs to be considered "when an accommodation is not possible in an employee's present job, or when an accommodation in the employee's present job

would cause an undue hardship." EEOC Technical Assistance Manual § 4.5(4), *reprinted in* 8 FEP at 405:7011. Here, Kirkingburg *was qualified* to perform the essential function of the job--driving. Therefore, he was entitled to reasonable accommodation, including reassignment. One form of reasonable accommodation would have been to temporarily transfer him to the yard hostler position in November. Albertsons allowed workers with license restrictions to work as a yard hostler position since the position did not require driving on the street. J.A. 324-325. There is evidence that prior to terminating Kirkingburg, Albertsons did not evaluate whether reassignment to a vacant position wouldbe a reasonable accommodation. J.A. 309, 313-314, 339-340, 343.[19]

After terminating him, Albertsons offered Kirkingburg a job as a yard hostler but withdrew that position. J.A. 271, 277-280, 328. The only position Albertsons offered Kirkingburg that it did not withdraw was as a tireman. J.A. 280-281. For a reassignment to be a reasonable accommodation it must be "an equivalent position, in terms of pay, status, etc." 29 C.F.R. Pt. 1630, App. § 1630.2(o). A question of fact exists as to whether the offer of reassignment to tireman was reasonable or not because it was not equivalent in terms of pay and Kirkingburg had no experience in that type

[19] In asserting it did not have to reasonably accommodate Kirkingburg, Albertsons attacks the validity of the FHWA waiver program, repeatedly referring to it as "experimental." However, as the Ninth Circuit noted, Albertsons failed to raise its "experimental" concerns at the time it refused to honor FHWA waivers. J.A. 243. While the waiver program was designed to study the existing vision requirements, it was also designed to maintain public safety. 57 Fed. Reg. 23370, 23371 (June 1992).

of position. J.A. 280-282.[20]

Albertsons' workers' compensation argument that finding an affirmative duty of reassignment to be included under the ADA's reasonable accommodation would convert the ADA into a form of a super workers' compensation statute is unpersuasive. Pet. Br. at 46-47. First, the statutory language speaks for itself in clear unambiguous terms, reassignment is a form of reasonable accommodation. 42 U.S.C. § 12111(9). Second, in this case, Albertsons had a separate and independent statutory obligation under the Oregon workers' compensation and employment laws to return Kirkingburg, as an injured worker, to his former position or to a vacant and suitable one if his position was not available. ORS 659.415; ORS 659.420. (See Appendix for text). Thus, given the possible combination of statutory duties, employers may at times have obligations greater than under one statute alone.

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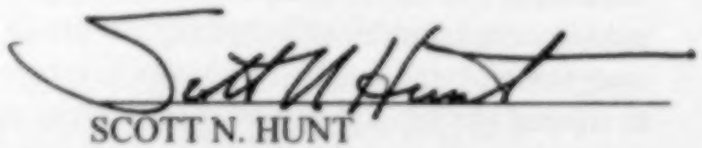
[20] Albertsons' assertion that an employee cannot be allowed to reject position after position without relieving the employer of its obligation has no relevance to this case at summary judgment. While an employer may have fulfilled its obligation where it offers a reasonable accommodation that is rejected, that scenario simply did not occur here. Only after terminating Kirkingburg did Albertsons offer him two positions. It withdrew one of the offers, and the other was not a reasonable accommodation as it did not involve reassignment to an equivalent position.

CONCLUSION

For the foregoing reasons, Mr. Kirkingburg respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit in its entirety and remand this action for trial.

Respectfully submitted,



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APPENDIX

Relevant Federal Statutes

42 U.S.C. § 12102. Definitions

As used in this chapter:

(2) Disability

The term "disability" means, with respect to an individual–

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

42 U.S.C. § 12111. Definitions

As used in this subchapter:

(3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(8) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability

who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation

The term "reasonable accommodation" may include–

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals

with disabilities.

42 U.S.C. § 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes–

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant

or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

42 U.S.C. § 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business

necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

Relevant Federal Regulations

29 C.F.R. § 1630.2 Definitions

(h) *Physical or mental impairment* means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine;

(i) *Major Life Activities* means functions such as caring for oneself, performing manual tasks, walking seeing, hearing, speaking, breathing, learning, and working.

(j) *Substantially limits*–(1) The term *substantially limits* means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(l) *Is regarded as having such an impairment* means:

(1) Has a physical or mental impairment that does not

substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h)(1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

(m) *Qualified individual with a disability* means an individual with a disability who satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position.

(n) *Essential functions*–(1) *In general.* The term *essential functions* means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

(o) *Reasonable accommodation.* (1) The term *reasonable accommodation* means:

(i) Modification or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment, as are enjoyed by its other similarly situated employees without disabilities.

(2) *Reasonable accommodation* may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring;

part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(r) *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk:

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

Relevant State Statutes

ORS 659.415 Reinstatement of worker sustaining compensable injuries; certificate of physician evidencing ability to work; effect of collective bargaining agreement; termination of right to reinstatement; when reinstatement right terminates.

(1) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, if the position exists and is available and the worker is not disabled from performing the duties of such position. A worker's former position is "available" even if the position has been filled by a replacement while the injured worker was absent. If the former position is not available, the worker shall be reinstated in any other existing position which is vacant and suitable. A certificate by the attending physician that the physician approves the worker's return to the worker's regular employment or other suitable employment shall be prima facie evidence that the worker is able to perform such duties.

(2) Such right of reemployment shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees.

(3) Notwithstanding subsection (1) of this section:

(a) The right to reinstatement to the worker's former position under this section terminates when whichever of the following events first occurs:

(A) A medical determination by the attending physician or, after an appeal of such

determination to a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656, has been made that the worker cannot return to the former position of employment.

(B) The worker is eligible and participates in vocational assistance under ORS 656.340.

(C) The worker accepts suitable employment with another employer after becoming medically stationary.

(D) The worker refuses a bona fide offer from the employer of light duty or modified employment which is suitable prior to becoming medically stationary.

(E) Seven days from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician has released the worker for employment unless the worker requests reinstatement within that time period.

(F) Three years from the date of injury.

(b) The right to reinstatement under this section does not apply to:

(A) A worker hired on a temporary basis as a replacement for an injured worker.

(B) A seasonal worker employed to perform less than six months work in a calendar year.

(C) A worker whose employment at the time of injury resulted from referral from a hiring hall operating pursuant to a collective bargaining agreement.

(D) A worker whose employer employs 20 or fewer workers at the time of the worker's injury and at the time of the worker's demand for reinstatement.

(4) Any violation of this section is an unlawful employment practice.

ORS 659.420 Employment of injured worker in other available and suitable work; termination of right to reemployment; certificate of physician; effect of collective bargaining agreement.

(1) A worker who has sustained a compensable injury and is disabled from performing the duties of the worker's former regular employment shall, upon demand, be reemployed by the worker's employer at employment which is available and suitable.

(2) A certificate of the worker's attending physician that the worker is able to perform described types of work shall be prima facie evidence of such ability.

(3) Notwithstanding subsection (1) of this section, the right to reemployment under this section terminates when whichever of the following events first occurs:

(a) The worker cannot return to reemployment at any position with the employer either by determination of the attending physician or upon appeal of that determination, by determination of a medical arbiter or panel of medical arbiters pursuant to ORS chapter 656.

(b) The worker is eligible and participates in vocational assistance under ORS 656.340.

(c) The worker accepts suitable employment with another employer after becoming

medically stationary.

(d) The worker refuses a bona fide offer from the employer of light duty or modified employment that is suitable prior to becoming medically stationary.

(e) Seven days elapse from the date that the worker is notified by the insurer or self-insured employer by certified mail that the worker's attending physician has released the worker for reemployment unless the worker requests reemployment within that time period.

(f) Three years elapse from the date of injury.

(4) Such right of reemployment shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees.

(5) Any violation of this section is an unlawful employment practice.